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No. 08-516

IN THE

Supreme Court of the United States

CITY OF SARALAND, ALABAMA, AND FRANK MANN,
Petitioners,

v.

MICHAEL PARDUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an individual who was subjected to baseless criminal prosecutions and who, incident to those prosecutions, was unconstitutionally seized in violation of the Fourth Amendment may seek redress for that constitutional violation under 42 U.S.C. § 1983.

2. Whether the court of appeals correctly concluded that, in this case, respondent's § 1983 claim accrued when the State decided not to reinstitute criminal charges against him.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

1. This case arises out of respondent Michael Pardue's effort to obtain redress for petitioners' institution of baseless criminal charges against him, which involved tactics such as coercing a confession, manufacturing false evidence, and withholding evidence.[1] In May 1973, police officers from Saraland, Alabama, and sheriff's deputies from Mobile County took Mr. Pardue,

[1] Because petitioners were granted summary judgment, the facts are to be taken in the light most favorable to respondent, the non-moving party. *See United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962).

then seventeen years old, into custody and accused him of killing two men in unrelated incidents during a single night. Pet. App. 32-33. The officers subjected Mr. Pardue to a long and brutal interrogation that lasted approximately 80 hours. *Id.* at 33. During the interrogation, the officers repeatedly beat Mr. Pardue, denied him food and water, refused to allow him to use a restroom, and turned away two attorneys who claimed to represent him. *Id.* at 33-34; Appellees' C.A. App. Vol. IV, Tab 11, at 472-480. Mr. Pardue eventually falsely confessed to killing the two men, as well as a third man whose remains were found during the interrogation. Pet. App. 34.

The officers' misconduct was not limited to the interrogation. They also fabricated evidence, including the purported murder weapon—a shotgun—and some rags, which were used to tie the shotgun to respondent and the murders. Pet. App. 34-35. And, as Mr. Pardue would learn many years later, the State also withheld evidence. *Id.* at 39 & n.17; Plf's Br. in Supp. of Summ. J. (Dkt. # 256), 1-2 & n.2, 4 n.7, 29; Appellant's C.A. App. Tab 7(a), (b); Appellees' C.A. App. Vol. IV, Tab 11, at 437-438, 446.

2. The State tried Mr. Pardue first for the murder of Ronald Rider. At the end of the one-day trial, in which Mr. Pardue's "confession" and the shotgun were entered into evidence, the jury returned a guilty verdict. Respondent received a life sentence. Pet. App. 36-37; Appellees' C.A. App. Vol. II, Tab 243-2, at 15-16, 17, 55-57. Mr. Pardue's counsel withdrew Mr. Pardue's appeal in the Rider case without consulting Mr. Pardue. Pet. App. 38.

Mr. Pardue later pled guilty to the murders of Will Hodges and Theodore White after he was told that he

would receive the death penalty if he did not. Pet. App. 37-38. Unbeknownst to Mr. Pardue, the death penalty was outlawed at the time under *Furman* v. *Georgia*, 408 U.S. 238 (1972). Pet. App. 37 & n.16.

3. Nearly twenty years later, Mr. Pardue began to obtain relief from the injustices worked by petitioners. In November 1992, the U.S. District Court for the Southern District of Alabama granted Mr. Pardue's habeas corpus petition, which gave him the opportunity to pursue an out-of-time appeal in the Rider case. *Ex parte Pardue*, 661 So. 2d 268, 269-270 (Ala. 1994). The Alabama Court of Criminal Appeals allowed the appeal to proceed, but affirmed Mr. Pardue's conviction. *See Pardue* v. *State*, 661 So. 2d 263 (Ala. Crim. App. 1993). The Alabama Supreme Court reversed that decision on the ground that the State had failed to carry its burden of proving that the confession was voluntary. *Ex parte Pardue*, 661 So. 2d at 272. The court reversed the conviction and remanded the case. *Id.* The Rider case was never retried but the criminal proceedings were not dismissed until 1997. In December 1994, the federal district court granted a second writ of habeas corpus on the ground that Mr. Pardue's guilty pleas in the Hodges and White cases were involuntary. *Pardue* v. *State*, 695 So. 2d 199, 200 (Ala. Crim. App. 1996). Although the State *nol prossed* the White murder charge, it reindicted Mr. Pardue for the Hodges murder. *Id.*

Before the retrial, the State produced—for the first time—a tape-recording of Mr. Pardue confessing to the Hodges murder; it was later revealed that the tape-recording had been altered.[2] Pet. App. 39; Appellant's

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[2] The State also produced potentially exculpatory evidence for the first time. *See, e.g.*, Plf's Br. in Supp. of Summ. J. (Dkt. #

C.A. App. Tab 7, Exh. 19. Mr. Pardue moved to suppress the confession, but the trial court denied his motion. *Pardue*, 695 So. 2d at 201. A jury found Mr. Pardue guilty. *Id.* at 200.

The Alabama Court of Criminal Appeals reversed the conviction. The court held that the State had again failed to prove that Mr. Pardue's confession was voluntary. *Pardue*, 695 So. 2d at 205. The court noted, *inter alia*, that Mr. Pardue was at the time only seventeen years old and exhibited signs of a mental disorder; that "he was subjected to simultaneous interrogation by as many as six officers ... over a period of approximately 78 hours; that the atmosphere in the jail was hostile; that two attorneys were refused access to Pardue" during the interrogation; and that Mr. Pardue had potentially requested an attorney during the interrogation. *Id.* The Alabama Supreme Court denied the State's petition for certiorari. Pet. App. 40.

4. With both the Hodges and Rider convictions reversed, the State filed *nolle prosequi* motions in both cases in June and August 1997, respectively, more than twenty years after Mr. Pardue was first charged with the murders. Pet. App. 40, 99.

5. Mr. Pardue filed this civil action in June 1999 against those who took part in the wrongful interrogation, investigation, and prosecution. Pet. App. 23. Petitioner Frank Mann was a Saraland police officer who participated in the interrogation and investigation of Mr. Pardue, *Id.* at 28.

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256), 1-2 & n.2, 4 n.7, 29; Appellant's C.A. App. Tab 7(a), (b); Appellees' C.A. App. Vol. IV, Tab 11, at 437-438, 446.

Mr. Pardue invoked 42 U.S.C. § 1983, alleging that the defendants violated and conspired to violate his rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Pet. App. 23-24. In particular, he alleged that numerous defendants, including petitioner Mann, violated his "Fourth Amendment rights to be free from malicious prosecution, to be free from unreasonable seizure of the person and to be free of unreasonable or unwarranted restraints of personal liberty." *Id.* at 50-51 (internal quotation marks omitted). The complaint also raised state-law claims. *Id.* at 24.

The defendants filed various motions to dismiss, which the district court (Vollmer, J.) granted in part and denied in part. As relevant here, the district court described Mr. Pardue's Fourth Amendment claim as one based on "malicious prosecution." Pet. App. 50-52. Although the district court dismissed the claim against other individual defendants on absolute and qualified immunity grounds, it permitted the Fourth Amendment claim against petitioner Mann to go forward. *Id.* at 50-57, 116 n.61.

The district court also rejected the defendants' statute of limitations arguments, concluding that Mr. Pardue had properly alleged that his state-law claims accrued when the State *nol prossed* the murder charges in 1997. Pet. App. 98-99, 107-112.[3] Pointing to, among other things, this Court's decision in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), the court explained that Mr. Pardue's claims raised doubts about the le-

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[3] At this stage of the proceedings, petitioners had not yet raised a statute of limitations question regarding the federal law claims. *See* Pet. 6.

gitimacy of his convictions and therefore did not accrue until the relevant charges were dismissed on the State's motions. Pet. App. 110-111. The court further concluded that Mr. Pardue's suit was brought within the limitations period after his claims accrued. *Id.* at 99, 111.

6. Judge Vollmer later died, and the case was reassigned to Judge Granade, who presided over summary judgment motions and cross-motions. The district court entered summary judgment in favor of defendants on Mr. Pardue's remaining federal claims based on the statute of limitations. Rejecting Judge Vollmer's earlier analysis, the court held that Mr. Pardue's claims accrued when the federal district court granted the writs of habeas corpus, not when the State thereafter decided to dismiss the prosecutions. Pet. App. 7-18. The court further concluded that Mr. Pardue's claims were barred by the two-year statute of limitations. *Id.* at 19. The court also declined pendent jurisdiction over Mr. Pardue's state-law claims. *Id.*

7. Mr. Pardue appealed to the Eleventh Circuit. In a short, unpublished opinion, the court of appeals vacated the district court's grant of summary judgment and remanded for further proceedings. Pet. App. 2. The court did not address whether a § 1983 claim for "malicious prosecution" (under the Fourth Amendment or otherwise) in fact exists, what the elements of such a claim are, or whether the elements should be ascertained by reference to federal or state law. With respect to the statute of limitations issue, the entirety of the court's discussion was the following: "[W]e agree with Judge Vollmer's original ruling that Pardue could

not have filed his § 1983 claims before the charges were *nolle prossed*." *Id.*[4]

ARGUMENT

A. Petitioners' Contentions About The Existence, Characterization, And Content Of A "Malicious Prosecution" Claim Under Section 1983 Do Not Merit This Court's Review

Petitioners principally contend (Pet. 8-15) that the courts of appeals are divided as to whether a claim may be pursued under 42 U.S.C. § 1983 for "malicious prosecution," and, if so, what the elements of such a claim are. Those contentions do not merit this Court's review. In this case, respondent claims that his Fourth Amendment rights were violated when he was seized incident to petitioners' institution and pursuit of baseless criminal charges against him. No court of appeals has concluded that such a claim may not be brought under § 1983. Although some courts have eschewed the "malicious prosecution" label for such claims, the question whether that framework is appropriate was not addressed by the Eleventh Circuit in this case and does not, in any event, rise to the level of an issue that warrants this Court's intervention. Further, what the elements of such a claim are was not discussed at all by the Eleventh Circuit (or by the parties in their appel-

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[4] Both the Eleventh Circuit and Judge Granade read Judge Vollmer's analysis to apply equally to the federal law claims, even though Judge Vollmer directly addressed only the state law claims. *See* note 3, *supra*. The Eleventh Circuit also reversed the dismissal of respondent's claims against the prosecutors on the basis that the record required further development on the absolute immunity question, and vacated the district court's dismissal of the pendent state-law claims. Pet. App. 2 & n.1.

late briefs), as the only issue resolved by the court of appeals was whether respondent's claim survived the statute of limitations.

Before this Court's decision in *Albright* v. *Oliver*, 510 U.S. 266 (1994), "[m]ost of the lower courts recognize[d] some form of malicious prosecution action under § 1983." *Id.* at 270 n.4 (plurality opinion). The primary disagreement between the circuits was "whether malicious prosecutions, standing alone, can violate the Constitution." *Id.*

Albright considered whether prosecution without probable cause violates the substantive due process rights of the accused. 510 U.S. at 268 (plurality). Although *Albright* did not produce a clear majority rationale, it made, as relevant here, two substantial contributions to the understanding of "malicious prosecution" claims under § 1983. First, prosecution without probable cause, standing alone, does not violate the substantive component of the Due Process Clause of the Fourteenth Amendment. *See id.* at 270 n.4, 275 (plurality). Second, a majority of the Justices appeared to accept the proposition that prosecution without probable cause may result in a violation of the Fourth Amendment, if (as is usually true) the accused is seized incident to the prosecution of the criminal case. *See id.* at 270 (plurality); *id.* at 275 (Scalia, J., concurring); *id.* at 277 (Ginsburg, J., concurring); *id.* at 286-291 (Souter, J., concurring in the judgment). Because the plaintiff in *Albright* had declined to pursue a Fourth Amendment claim, the Court did not decide whether his claim would in fact succeed under the Fourth Amendment. *Id.* at 274 (plurality).

Following *Albright*, the courts of appeals have reexamined whether individuals who are unlawfully

seized incident to a malicious prosecution (*i.e.*, a prosecution without probable cause) may bring a claim under § 1983 resting on the Fourth Amendment. The Eleventh Circuit has concluded that such a claim exists. *See, e.g.*, *Kingsland* v. *City of Miami*, 382 F.3d 1220 (11th Cir. 2004); *Wood* v. *Kesler*, 323 F.3d 872 (11th Cir. 2003); *Uboh* v. *Reno*, 141 F.3d 1000 (11th Cir. 1998); *Whiting* v. *Traylor*, 85 F.3d 581 (11th Cir. 1996). Although the Eleventh Circuit continues to use the term "malicious prosecution" for such claims, it has made clear that the basis of such a claim is, and must be, that the plaintiff was unlawfully "seized" in violation of the Fourth Amendment:

> Labeling ... a section 1983 claim as one for a "malicious prosecution" can be a shorthand way of describing a kind of legitimate section 1983 claim: the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead.

Whiting, 85 F.3d at 584; *see also id.* at 584 n.4 ("we think referring to a federal 'right' to be free from malicious prosecution is actually a description of the right to be free from an unlawful seizure which is part of a prosecution").

No court of appeals has held that such a Fourth Amendment violation is not cognizable under § 1983. As the D.C. Circuit recently noted, "nearly every other Circuit has held that malicious prosecution is actionable under the Fourth Amendment to the extent that the

defendant's actions cause the plaintiff to be 'seized' without probable cause."[5] *Pitt* v. *District of Columbia*, 491 F.3d 494, 510 (D.C. Cir. 2007); *see id.* at 511 (recognizing the claim); *Becker* v. *Kroll*, 494 F.3d 904, 914 (10th Cir. 2007) ("We have repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be 'the Fourth Amendment's right to be free from unreasonable seizures.' " (quoting *Taylor* v. *Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996)); *Gregory* v. *City of Louisville*, 444 F.3d 725, 749 (6th Cir. 2006) ("We have also affirmatively recognized the viability of such Fourth Amendment-based claims under § 1983."); *Lambert* v. *Williams*, 223 F.3d 257, 260-262 (4th Cir. 2000) (explaining that a § 1983 malicious prosecution claim "is nothing more than a § 1983 claim arising from a Fourth Amendment violation"); *Gallo* v. *City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) ("Thus, as the Court of Appeals for the Second Circuit stated in a post-*Albright* decision, a plaintiff asserting a malicious prosecution claim must show 'some deprivation of liberty consistent with the concept of "seizure." ' " (quoting *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995))); *Singer*, 63 F.3d at 116 ("Once a plaintiff presents a claim of malicious prosecution under § 1983, the court must engage in two inquiries: whether the defendant's conduct was tortious; and whether the plaintiff's injuries were caused by the dep-

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[5] The D.C. Circuit pointed only to the Eighth Circuit as having "held that malicious prosecution claims do not implicate any constitutional rights." *Pitt* v. *District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007). In fact, the Eighth Circuit has not foreclosed § 1983 relief for such a Fourth Amendment claim. *See* p. 11, *infra*.

rivation of liberty guaranteed by the Fourth Amendment."); *see also Awabdy* v. *City of Adelanto*, 368 F.3d 1062, 1069 (9th Cir. 2004) (malicious prosecution is actionable under § 1983 to the extent that it accompanies a denial of a constitutional right).[6]

The Eighth Circuit has stated that malicious prosecution "*by itself* is not punishable under § 1983 because it does not allege a constitutional injury." *Kurtz* v. *City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001) (emphasis added). But the Eighth Circuit has also explained that "malicious prosecution can form the basis for a section 1983 action ... if the defendants' conduct also infringes some provision of the Constitution or federal law," *Gunderson* v. *Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990), which leaves open the possibility of a claim under § 1983 for a Fourth Amendment violation caused by a seizure incident to a prosecution without probable cause.

Although the Seventh Circuit has repudiated the "malicious prosecution" label for § 1983 claims, *see Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001), its decision must be put into context. The court's prior decisions "implied" that § 1983 claims of malicious prosecution "should be analyzed under the substantive due process approach." *Id.* It was *that* approach the court rejected. The court did not hold that a § 1983 remedy was unavailable for an alleged Fourth Amendment violation. *See id.* ("if a plaintiff can establish a

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[6] The First Circuit has "assume[d] without deciding that malicious prosecution can, under some circumstances, embody a violation of the Fourth Amendment and thus ground a cause of action under section 1983." *Nieves* v. *McSweeney*, 241 F.3d 46, 54 (1st Cir. 2001).

violation of the fourth amendment (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution' "). As the court later put it, "[t]he first lesson we take from *Albright*, *Newsome*[], and *Ienco* [v. *City of Chicago*, 286 F.3d 994 (7th Cir. 2002)], is that it is possible to state a § 1983 claim that relies on the Fourth Amendment." *McCullah* v. *Gadert*, 344 F.3d 655, 659 (7th Cir. 2003).

The Fifth Circuit's decision in *Castellano* v. *Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc), upon which petitioners specially rely, is similar to the Seventh Circuit's decision in *Newsome*. Petitioners correctly state that the Fifth Circuit rejected the "malicious prosecution" framework, *see id.* at 954, but petitioners fail to note that the court specifically left open the possibility of obtaining § 1983 relief for the Fourth Amendment injury:

> The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, or other constitutionally protected rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983.

Id. at 953-954.

Thus, it is simply not the case, as petitioners maintain (Pet. 15), that the courts are in "disarray ... over the existence and definition of a § 1983 malicious prosecution claim." On the contrary, there is broad agreement that if a criminal defendant is seized incident to

the institution of a prosecution without probable cause, that seizure may violate the Fourth Amendment, and the individual may have redress under § 1983. No court of appeals has held otherwise.[7]

Petitioners also contend (Pet. 13-15) that there are differences among the circuits over the elements of a § 1983 claim for a Fourth Amendment violation incident to a "malicious prosecution." Petitioners maintain, for example, that some courts of appeals require proof of the elements of the common law tort of malicious prosecution, whereas others may not (Pet. 10-12). But even if such differences might merit this Court's review at some point, this case does not provide an appropriate occasion to examine the elements of such a claim, because the court of appeals did not address that issue *at all* in its brief, unpublished decision. All the court of appeals decided with respect to respondent's claim is that it is not barred by the statute of limitations. What respondent must prove to prevail remains to be decided in the first instance on remand by the district court

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[7] Petitioners' suggestion (Pet. 15) that the existence of a state law remedy—the tort of malicious prosecution—displaces a § 1983 Fourth Amendment claim is incorrect. That contention rests on a misreading of Justice Kennedy's concurrence in *Albright*. Justice Kennedy viewed the particular claim in *Albright* as implicating due process and not a seizure under the Fourth Amendment, *see* 510 U.S. at 281 (Kennedy, J., concurring in the judgment), which brought the doctrine of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), to bear, *see id.* at 283-284 (Kennedy, J., concurring in the judgment). Petitioners cite no authority holding that *Parratt* applies to § 1983 Fourth Amendment claims, and this Court's decisions state the contrary. *See Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990) ("A plaintiff may bring suit under § 1983 for state officials' violation of his rights to, *e.g.*, freedom of speech or freedom from unreasonable searches and seizures.").

(which also did not address any of these issues). Accordingly, this case would be an inappropriate vehicle for the Court to articulate the elements of § 1983 claims such as those brought by respondent.

B. The Court Of Appeals' Accrual Ruling Also Does Not Merit Review

Petitioners' second contention (Pet. 16-23) is that the court of appeals erred in ruling that respondent's § 1983 claim accrued when the criminal charges against him were dismissed and not, as petitioners maintain, when the federal district court issued writs of habeas corpus (one of which merely allowed Mr. Pardue to pursue an appeal in the Rider case). For that proposition petitioners rely heavily on a passage in *Heck* v. *Humphrey*, 512 U.S. 477 (1994). In *Heck*, this Court held that a § 1983 "cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated," *id.* at 489-490, and further stated that such a claim may not be instituted until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus," *id.* at 485.

Petitioners isolate the Court's passing reference to issuance of a writ of habeas corpus to argue that respondent should have brought his § 1983 claim immediately after the writs issued in his case, even though the State did not abandon its efforts to prosecute him for several years after that and, in fact, retried him on one of the charges. Petitioners' contention does not merit this Court's review. Petitioners have failed to show that the Eleventh Circuit's one-sentence accrual ruling

is in conflict with *Heck*, any other decision of this Court, or any decision of another court of appeals. Nor is there any substantial basis for petitioners' contention that the Eleventh Circuit, in conflict with other courts, impermissibly relied on state law rather than federal law to determine the accrual date of respondent's claim.

The court of appeals ruled that Mr. Pardue's claims could not have accrued "before the charges were *nolle prossed*."[8] Pet. App. 2. Nothing in *Heck* forecloses such a holding. The only holding of *Heck* is that a § 1983 claim predicated on unconstitutional action the unlawfulness of which would effectively render a conviction or sentence invalid may *not* proceed unless and until the conviction or sentence has already been invalidated; because the petitioner in *Heck* had not obtained any kind of official determination that his conviction was invalid, he could not pursue a § 1983 claim that, if successful, would have had that result. *See* 512 U.S. at 486. The Court undertook to answer only the threshold question whether the relevant conviction *must* have been invalidated prior to the filing of suit, not whether a certain event did in fact invalidate that conviction at some time in the past. This Court also had no occasion in *Heck* to articulate the exact kind of official action that would be sufficient to invalidate a conviction for the purpose of causing the accrual of a § 1983 malicious prosecution claim. Because Heck's conviction had been affirmed by the Indiana Supreme Court with no subsequent order to the contrary, there

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[8] Because the trial court has discretion under Alabama law to grant or deny the State's *nolle prosequi* motions, the charges may not be dismissed until the court so orders. *See* Ala. Code § 15-8-130 (1975); *State* v. *McNeill*, 716 So. 2d 250 (Ala. Crim. App. 1998).

was no need for the Court to set forth an exhaustive list of events that may have invalidated the conviction at issue.

Petitioners appear to contend that this Court intended the four kinds of official actions named in *Heck* to serve as a kind of all-inclusive checklist to determine when a § 1983 claim accrues. *See* Pet. 21 (stating that "the Court in *Heck* did not include the entry of *nolle prosequi* as one of those possible triggers for accrual"). There is no reason to read the *Heck* opinion that way, however. *Heck* did instruct courts to analyze, on a case-by-case basis, whether "judgment in favor of the plaintiff would necessarily imply the invalidity of the conviction or sentence." 512 U.S. at 487. But the Court also made clear in *Heck* that it was relying by analogy on the common law tort of malicious prosecution, one element of which is "termination of the prior criminal proceeding in favor of the accused." *Id.* at 484.

The Court nowhere addressed in *Heck* whether (for example) the grant of habeas corpus or reversal of a conviction would be sufficient by itself to allow a § 1983 malicious prosecution to go forward, or whether the plaintiff would also have to show that the criminal proceeding had been "terminated," in that the State had determined that it should not attempt to retry the charges (or had been barred from doing so). There is certainly ample support for the latter approach. In the Hodges and White cases, for example, the grants of habeas corpus did not constitute favorable terminations of the criminal case because they did not preclude further proceedings against Mr. Pardue on the same charges. *See, e.g., DiBlasio* v. *City of New York*, 102 F.3d 654, 658 (2d Cir. 1996) ("Although in some instances a habeas court may terminate a criminal proceeding in the defendant's favor, the reversal of a conviction and re-

mand for a new trial does not constitute such a termination."). In addition, a grant of a habeas corpus petition that stops short of ordering the plaintiff released (even conditionally, subject to a retrial) neither terminates the proceedings nor calls into question the validity of the conviction—as in this case, where one of the grants of habeas (in the Rider case) only allowed Mr. Pardue to pursue an appeal.

There is also no basis for petitioners' suggestion (Pet. 20-21) that the Eleventh Circuit's ruling conflicts with *Wallace* v. *Kato*, 549 U.S. 384 (2007). *Wallace* ruled that the date of accrual of a § 1983 claim is a question of federal law, but the Eleventh Circuit has nowhere indicated otherwise, either in the decision below (which did not discuss that issue) or in any other case.[9] Indeed, the Eleventh Circuit has previously ruled, in a case not mentioned by petitioners, that "a Fourth Amendment malicious prosecution claim under § 1983 remains a federal constitutional claim, and its elements and whether they are met ultimately are controlled by federal law." *Wood* v. *Kessler*, 323 F.3d at 883; *see also Kelly* v. *Serna*, 87 F.3d 1235, 1238-1239 (11th Cir. 1996) ("Accrual of a cause of action under 42 U.S.C. § 1983 is a question of federal law."). To the extent the Eleventh Circuit's case law might be said to have adopted a "fa-

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[9] *Wallace* is also of limited relevance in this context because it did not involve a malicious prosecution § 1983 claim, as the Court noted at several points, *see* 549 U.S. at 388-390. Rather, it involved a § 1983 claim more analogous to one for false arrest. Thus, the Court's observations about the need not to defer accrual of a claim for false arrest until a potential criminal prosecution might have been invalidated, *see id.* at 393-394, are beside the point here, where the predicate of Mr. Pardue's claim is that the prosecutions that were actually instituted against him were baseless.

vorable termination" accrual rule, it was adopting that rule as a matter of federal law, and was following a long line of precedent relying on common law tort rules to ascertain the contours of a § 1983 claim—exactly what this Court did in *Heck*, *see* 512 U.S. at 486-487. *See also Wallace*, 549 U.S. at 388 ("Aspects of § 1983 which are not governed by reference to state law are governed by federal rules conforming in general to common-law tort principles"); *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978); *Lambert*, 223 F.3d at 262.

Petitioners nowhere even suggest that the Eleventh Circuit's decision conflicts with that of any other court of appeals.[10] They do identify three appellate decisions that, they say, show that the lower courts "continue to wrestle with the analysis for the accrual of these § 1983 malicious prosecution-type claims" (Pet. 19). Those cases are irrelevant here. *Eidson* v. *State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631 (6th Cir. 2007), involved not a "malicious prosecution-type claim" but a parent's claim that his due process rights were violated when the State of Tennessee removed his children from his custody; the Sixth Circuit ruled that *Heck* was irrelevant to the accrual question because the plaintiff's claims were not sufficiently analogous to ma-

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[10] The district court relied in part on *Smith* v. *Gonzales*, 222 F.3d 1220 (10th Cir. 2000), but that case does not present any conflict with the Eleventh Circuit's decision in this case. The court in *Smith* expressly recognized that an intervening order granting habeas relief does not trigger the accrual of a § 1983 malicious prosecution claim where, as with the Hodges conviction, the plaintiff remained subject to "serious charges" and would again face "trial for his life" on the basis of the same false evidence offered in the first trial. *Id.* at 1222-1223 (distinguishing *Robinson* v. *Maruffi*, 895 F.2d 649 (10th Cir. 1990)).

licious prosecution. *See id.* at 639-641. *Mondragon* v. *Thompson*, 519 F.3d 1078 (10th Cir. 2008), merely suggested that the plaintiff had pleaded facts that might support a malicious prosecution claim and remanded for a further determination by the district court; it did not endeavor to specify the accrual date for such a claim.[11] *Washington* v. *Summerville*, 127 F.3d 552 (7th Cir. 1997), held on the facts of that case that a *nolle prosequi* motion was not a favorable termination of the case under state law, but that decision turned on the unusual fact that the record suggested that the State's decision to abandon the criminal case against the plaintiff was not based on the inference that reasonable grounds to pursue the criminal prosecution were lacking. *See id.* at 557-558.[12] Moreover, the Seventh Circuit quite clearly did not hold that the elements of a § 1983 "malicious prosecution-type" claim are controlled by the elements of a state law malicious prose-

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[11] The court in *Mondragon* commented that a malicious prosecution-type claim "does not accrue until the process terminates in [the defendant's] favor, which presumably is the date his habeas corpus petition was granted," 519 F.3d at 1084, but that was not the holding of the case, and the court elsewhere stated such a claim covered "[t]he period of time between the institution of that process and its favorable termination—through acquittal, habeas corpus, voluntary dismissal, etc.," *id.* at 1083. The court further stated that such a claim "accrues, at the earliest, when favorable termination occurs," *id.*, without further defining the concept of "favorable termination."

[12] *See* 8 S. Speiser, C. Krause & A. Gnas, *American Law of Torts* § 28:5, at 25, 27-28 (1991) (explaining that *nolle prosequi* motions constitute favorable terminations unless they result from compromise, the misconduct of the accused, or the accused's request for mercy (discussing *Restatement (Second) of Torts* § 660 (1977)).

cution tort, *see id.* at 559 ("A state law cause of action for malicious prosecution is not interchangeable with a federal action"), and it concluded that the plaintiff's § 1983 claim was more properly treated as a false arrest claim for accrual purposes. *See id.*

For all the foregoing reasons, this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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